SEP 3 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-308

CLARENCE RILEY, NELLIE GAUGHRAN, JAMES STITH, ANNIE SMITH, ALLEAN GARDNER, WILLIAM DAVIS, WILLIAM BANKS, CHARLES TURNER, ELLA GREGORY, ETHEL BANKS, ULA KEELER and VERNIE TURNER,

Petitioners,

against

REVEREND JAMES H. HOWELL, JOHN OVERBEY, HORACE JONES, MANUEL MANNING, TOM BENNETT, MELVIN MARTIN and MYRON PRICE,

Respondents.

Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

LEON J. GREENSPAN,
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IN THE

Supreme Court of the United States

No. ———

CLARENCE RILEY, NELLIE GAUGHRAN, JAMES STITH, ANNIE SMITH, ALLEAN GARDNER, WILLIAM DAVIS, WILLIAM BANKS, CHARLES TURNER, ELLA GREGORY, ETHEL BANKS, ULA KEELER and VERNIE TURNER,

Petitioners,

against

REVEREND JAMES H. HOWELL, JOHN OVERBEY, HORACE JONES, MANUEL MANNING, TOM BENNETT, MELVIN MARTIN and MYRON PRICE,

Respondents.

Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari be issued to review the judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered the 14th day of January, 1974, affirming a judgment in favor of the respondents entered the 1st day of May, 1973, before the Honorable John J. Dillon, Justice of the New York Supreme Court, wherein it was ordered, adjudged and decreed that Reverend James H. Howell, one of the respondents, was the lawful pastor of the Bethesda Baptist Church of Port Chester, New York, and that the petitioners would be

forever enjoined from in any way interfering with Reverend James H. Howell in his position as pastor of said church. Leave to appeal to the Court of Appeals of the State of New York was denied by the Court of Appeals on June 5, 1974.

Opinions Below.

The final decision of the New York State Court of Appeals, dated June 5, 1974, which denied the petitioners leave to appeal to the highest court in the State of New York, was entered on the 5th day of June, 1974, and is attached as part of the Appendix to this petition.

An order affirming the judgment of the trial court, dated January 14, 1974, was rendered by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and was entered on the 14th day of January, 1974, and is attached as part of the Appendix to this petition, as is the written decision of said court.

The judgment of the New York Supreme Court, in and for the County of Westchester, dated May 1, 1973, was entered on the 1st day of May, 1973, and is attached as part of the Appendix to this petition, as is the written decision of the Honorable John J. Dillon, Justice of the Supreme Court, dated the 12th day of April, 1973.

Jurisdiction.

The jurisdiction of this court is invoked under 28 U. S. C. 1257 (3).

Question Presented.

Whether a state court may determine a dispute as to the status of a Baptist Minister serving pursuant to a

written contract, by interpreting Baptist theology where such an interpretation is inconsistent with the interpretation thereof given by the highest ecclesiastical tribunal of the Baptist Church concerned, which is the congregation itself in order to maintain him in office as pastor?

Statutory and Constitutional Provisions Involved.

U. S. Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *.

Statement of the Case.

In the summer of 1972, the members of the congregation of the Bethesda Baptist Church in Port Chester, New York, sought to remove the Reverend James H. Howell from his position as pastor of the church because he no longer represented the religious views of the majority of the congregation. The intended removal of Reverend Howell became an extremely emotional issue in the church between those who supported Reverend Howell and those who sought his removal. A meeting of the congregation at which the proposed removal could be voted on was called for the night of August 14, 1972, but, since it was apparent that the respondents would not physically permit the petitioners (opponents of Reverend Howell) to enter the church and threatened them with imminent violence, the petitioners were forced to seek an injunction restraining the respondents from interfering with the meeting.

A summons and complaint seeking a permanent injunction was served on August 14th. Simultaneously therewith, the petitioners obtained an order to show cause

containing a restraining provision enjoining the respondents from interfering with the meeting noticed for and scheduled to be held that evening. Notwithstanding this court order, the meeting could not take place as scheduled due to the inability of the Port Chester police, who were faced with a near-riot, to enforce the court's order. The next day, the parties appeared in court and were ordered to hold the meeting on August 28th, at which time the majority of the congregation voted to remove Reverend Howell.

The central issue at the trial of this action focused not so much on the vote count, but on the validity of the procedures used by the church in its removal, or its attempted removal of Reverend Howell from his position as pastor of the church. Whether or not Reverend Howell was properly discharged depends on the interpretation given to Baptist theology regarding the discharge of a pastor. It was uncontested that no specific charges of misconduct were levied against Reverend Howell and only one meeting took place before Howell was dismissed. The respondents contended that a Baptist church must present *specific* charges of misconduct before it can discharge its minister and that *two* meetings of the congregation (one to present the charges and another to vote on them) must take place before a pastor can be dismissed. It was thus clear that whether or not Reverend Howell was properly discharged depended upon the interpretation given to Baptist theology.

The trial court, believing that it had jurisdiction to interpret Baptist church theology with respect to these procedures, found that specific charges must be brought and that two meetings were required thus overruling the procedures established by the Bethesda Baptist Church itself. The trial judge thus found in favor of the respondents and issued a far-reaching judgment and order

decreeing that (1) Reverend Howell was the lawful pastor of the church, (2) the August 28th attempt to discharge him was a nullity, and (3) the petitioners would be enjoined *forever* from in any way interfering with Reverend Howell in his position as pastor of the church.

ARGUMENT.

The First Amendment prohibits a court from interpreting religious doctrine to impose upon a church a minister whom it has discharged.

The central issue raised at the trial of this action focused upon the validity of the procedures used by the Bethesda Baptist Church of Port Chester to remove Reverend Howell from his position as pastor of that church. The issue was clear: The petitioners maintained that the church had the exclusive right to determine whether or not it wished to employ a particular pastor, not the state; the trial court, believing that it had the jurisdiction to interpret Baptist Church doctrine with respect to the "proper" procedure to be used when discharging a Baptist minister, concluded that the church improperly discharged him. The court further exceeded its authority in its order, wherein it (1) declared a "nullity" the meeting held to vote on Reverend Howell's discharge, (2) decreed that Reverend Howell was the lawful Pastor of the Bethesda Church, and (3) permanently enjoined the church, its deacons, trustees and officers from interfering with Reverend Howell's position as pastor. In effect, the trial court installed Reverend Howell as the permanent pastor of the Bethesda Baptist Church, contrary to the will of the majority of its members.

Government interference in the affairs of religious organizations is carefully circumscribed by the First Amendment to the U. S. Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *.

See also, N. Y. Constitution, Article 1, Section 3. The first amendment has two aspects: The Establishment Clause and the Free Exercise Clause. Separation of Church and State is the rule under the Establishment Clause: the state must not get entangled or actively involved in religious affairs. *Engle v. Vitale*, 370 U. S. 421 (1962); *Everson v. Board of Education*, 330 U. S. 1 (1947). Non-interference with religious belief and practices is the rule under the Free Exercise Clause. *Wisconsin v. Yoder*, 406 U. S. 205 (1972). Because the right guaranteed by the Free Exercise Clause is a "fundamental right" under our system of jurisprudence, even the most indirect burden on the free exercise of religion is invalid, absent a showing by the state of a compelling state interest. *Id.* at 214, *Sherbert v. Verner*, 374 U. S. 398, 403 (1963). Both the Free Exercise and Establishment Clauses require that the State maintain a policy of "strict neutrality" with regard to religious affairs. *Walz v. Tax Commission*, 397 U. S. 664, 668 (1970).

A serious problem arises in cases wherein a religious dispute occurs between factions within a church. A court asked to resolve such a dispute is faced with a dilemma: If it decides the case, it must of necessity interpret church doctrine thereby (1) becoming "entangled" in religious affairs, and (2) infringes on the religious views of the faction it decides against; if it refuses to hear the case, it avoids its time-honored responsibility to peacefully settle disputes. This court, however, has been quite explicit in favoring the constitutional standard of "neutrality" in such cases: a civil court may not interfere in religious disputes or make an independent interpretation of church doctrine unless a claim of fraud, collu-

sion, or arbitrariness is presented. It must instead defer to the interpretation given by the highest ecclesiastical tribunal of the religious body whose doctrine is being examined. *Presbyterian Church v. Mary Elizabeth Blue Hill Memorial Presbyterian Church*, 393 U. S. 440 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94, 143 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U. S. 1 (1929). This lack of power to resolve religious controversies also finds acceptance in New York case law. See, e. g., *Russian Church of Kazan v. Dunkel*, 33 N. Y. 2d 456 (1974).

The policy underlying the proscription against state interference in religious conflicts is the fear that such interference could lead to the "total subversion" of religious bodies since "anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed." *Kedroff v. St. Nicholas Cathedral, supra*, at 114. The concept of separation of church and state is totally inconsistent with a state permitting its civil courts to determine ecclesiastical questions; it is for this reason that this court has held that civil courts have "no role" in determining such questions in the absence of "fraud, collusion, or arbitrariness," but must instead deem the decision of the church's highest tribunals as conclusive. *Presbyterian Church v. Mary Elizabeth Blue Hill Memorial Presbyterian Church*, *supra*, at 444-5.

To be sure, this rule requires a court to first determine the question of what authority is the highest ecclesiastical authority for the church whose religious doctrine is at issue. This inquiry should pose no problem: if the polity is higher heirarchical, the authority lies in the judiciatories of that denomination; conversely, if the polity is congregational, the highest authoritative tribunal would be the decision of the congregation itself.

Religious organizations can be divided into two groups; congregational churches and heirarchical churches. A congregational church is governed solely by and within itself, while a heirarchial church is "organized by a body with other churches having similar faith and doctrines with a common ruling convocation or ecclesiastical head." *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94, 110 (1952). This distinction is crucial with regard to the governing of each kind of church: under the ecclesiastical system, the local church is under the control of the church's heirarchy; under the congregational system, the local church is self-governing.

Unlike the Catholic and Presbyterian churches, Baptist churches are congregational—each local church is an independent entity having no authority higher than the congregation itself. The Baptist churches do not recognize a central, governing authority, but are rather a loose affiliation of independent churches having similar religious beliefs and practices. Each Baptist church is recognized as a pure democracy, subject to the express will of the majority. *Mitchell v. Church of Christ*, 120 So. 781 (Alabama 1930). Consequently, each local church is free to establish its own set of by-laws by which it chooses to be governed. 66 Am. Jur. 2d (Religious Societies), Section 9 at 764.

The problem with the approach used by the trial court was that it sought to compare the procedures used by the Bethesda Baptist Church of Port Chester with "general Baptist Law, tradition and custom." The central issues were whether specific charges of wrongdoing or misconduct had to be made against a pastor before he could be dismissed by the church that hired him, and whether one or two meetings of the congregation would be sufficient to dismiss. Rather than look to the local written rules of procedure which govern the local church, the court

chose to hear "expert" testimony concerning general Baptist law, tradition and custom. For two weeks, the Westchester County Courthouse became the forum for a theological and philosophical debate between two groups of Baptist theologans concerning their views of the "proper" relationship between a Baptist minister and his congregation, the right of a congregation to dismiss him and the "proper" procedures to be followed if the congregation wishes to effectuate its desire. After hearing this testimony, the court concluded that since a majority of the church's congregation failed to follow "prescribed procedures" according to Baptist religious doctrine, the purported discharge was a "nullity." By doing so, the court imposed a spiritual leader upon an unwilling church congregation and interfered in what should have been a private, religious function.

This was not a case where no rules for dismissing a pastor existed; for example, Article 3 of the church's constitution (Exhibit C) provides:

> A simple majority of members voting shall be necessary to call a pastor. However, three-fourths (3/4) of the congregation shall be present to dismiss a pastor.

The simple procedure required for dismissing the pastor is contained in the church's constitution under the heading "Discipline":

> No charge against a member shall come before the church, with a view to discipline, unless it has first been discussed with the pastor and the Board of Deacons.

Nowhere in the constitution is mentioned the two cardinal points stressed by the expert witnesses of the respondents: to wit, 1) that a pastor may be dismissed only where charges are brought, and 2) that two meetings of

the spiritual body are necessary to effectuate his dismissal. The Bethesda Baptist Church customarily terminated a minister in accordance with his employment contract. The contract in this case (Exhibit B) specifically stated that Reverend Howell would be employed "so long as pastor and church agree" and reflected the commonsense understanding that a congregation that hires a pastor may terminate his employment for reasons other than moral turpitude. It surely flies in the face of logic to require a congregation to suffer indefinitely under the spiritual leadership of a man by whom they no longer chose to be guided, solely because the pastor's conduct is not specifically reproachable.

What has happened in this case is the precise situation feared by the framers of the constitution: where the state imposes a spiritual leader upon a congregation, interprets religious theology, and commits the kind of excessive intrusion by a civil government into the internal affairs of a religious organization sought to be avoided by the establishment clause. *Walz v. Tax Commission*, 397 U. S. 664, 668 (1970). In sum, the actions of the trial court were in gross violation of United States Constitution and resulted in the deprivation of the petitioners' right to the free exercise of their religion.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEON J. GREENSPAN,
Attorney for Petitioners.

Of Counsel:
DENNIS G. KATZ.

APPENDIX.

Decision of the Court of Appeals, State of New York.

2 Mo. No. 206

CLARENCE RILEY &ors.,

Appellants,

vs.

REVEREND JAMES H. HOWELL &ors.,

Respondents.

Motion for leave to appeal &c. denied.

Decision Court of Appeals Jun 5—1974

Order of the Appellate Division on Appeal From Judgment.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on January 14, 1974.

Hon. J. Irwin Shapiro,
Acting Presiding Justice.
Hon. Frank A. Gulotta,
Hon. Marcus G. Christ,
Hon. Arthur D. Brennan,
Hon. A. David Benjamin,
Associate Justices.

CLARENCE RILEY *et al.*,

Appellants,

v.

REVEREND JAMES H. HOWELL *et al.*,

Respondents,

and

BETHESDA BAPTIST CHURCH OF PORT CHESTER, N. Y.,

Appellant.

In the above entitled cause, the above named Clarence Riley et al., plaintiffs and Bethesda Baptist Church of Port Chester, N. Y., additional defendant, having appealed to this court from a judgment of the Supreme Court, Westchester County, entered May 1, 1973; the said

appeal having been argued by Dennis G. Katz, Esq., of counsel for the appellants and by Louis Weiner, Esq., of counsel for the respondents, due deliberation having been had on said appeal, and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed, without costs.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

Decision of the Appellate Division.

.....A D 2d..... A—November 13, 1973.

CLARENCE RILEY *et al.*,

Appellants,

v.

REVEREND JAMES H. HOWELL *et al.*,

Respondents,

and

BETHESDA BAPTIST CHURCH OF PORT CHESTER, N. Y.,

Appellant.

2069 E

Judgment of the Supreme Court, Westchester County, entered May 1, 1973, affirmed, without costs.

We do not construe the fifth decretal paragraph in the judgment as restraining plaintiffs, in any manner, from taking further proper procedures for the termination of the employment of the defendant reverend, if they be so advised.

Shapiro, Acting P.J., Gulotta, Christ, Brennan and Benjamin, JJ., concur.

January 14, 1974.

Judgment of Hon. John J. Dillon.

At a Special Term, Part III of the Supreme Court, held in and for the County of Westchester at the County Courthouse, White Plains, New York, on the 1st day of May 1973.

Present:

Hon. John J. Dillon, Justice.

CLARENCE RILEY, NELLIE GAUGHRAN, JAMES STITH, ANNIE SMITH, ALLEAN GARDINER, WILLIAM DAVIS, WILLIAM BANKS, CHARLES TURNER, ELLA GREGORY, ETHEL BANKS, ULA KEELER and VERNIE TURNER,

Plaintiffs,

against

REVEREND JAMES H. HOWELL, JOHN OVERBEY, HORACE JONES, MANUEL MANNING, TOM BENNETT, MELVIN MARTIN and MYRON PRICE,

Defendants,

and

BETHESDA BAPTIST CHURCH OF PORT CHESTER, N. Y.,

Additional Defendant.

Index No. 10200/72

The plaintiffs above named having commenced the above action for a permanent injunction restraining the above named defendants from interfering with a meeting of the spiritual body of the Bethesda Baptist Church of Port Chester, N. Y., scheduled to be held on August 14, 1972, and thereafter adjourned to and held on August 28, 1972, and the defendants having interposed an an-

swer with a counterclaim on behalf of the defendant, Rev. James H. Howell, demanding a declaratory judgment herein affirming his status as Pastor of the aforementioned Church, and the plaintiffs having withdrawn their complaint and having interposed a reply to the said counterclaim, with affirmative defenses therein, and joining in the demand for a declaratory judgment, and the issues of this action having duly come on for trial and having been tried before the undersigned, one of the Justices of this Court, at a Special Term, Part III thereof, held in and for the County of Westchester, at the Courthouse, in the City of White Plains in said County, and the defendants having appeared at said trial by their attorney, Louis Weiner, and the plaintiffs and the additional defendant having appeared by their attorneys, Greenspan, Aurnou & Davis, (Leon J. Greenspan of Counsel), and the Court having heard the allegations and proofs of the respective parties, and due deliberation having been had thereon, and the written Decision of this Court dated April 12, 1973, having been made and filed.

Now, on motion of Louis Weiner, attorney for the defendants, it is

ORDERED, ADJUDGED AND DECREED, that Rev. James H. Howell was lawfully employed on May 1, 1970, by the Bethesda Baptist Church of Port Chester, N. Y., as its Pastor; and it is further

ORDERED, ADJUDGED AND DECREED, that the Constitution of the Bethesda Baptist Church of Port Chester, N. Y., dated December 15, 1970, was validly adopted as the Constitution of said Church; and it is further

ORDERED, ADJUDGED AND DECREED, that the attempt made on August 28, 1972 to discharge the Rev. James H.

Howell as Pastor of the said Church was and is a nullity; and it is further

ORDERED, ADJUDGED AND DECREED, that at all times since May 1, 1970, the said Rev. James H. Howell was and still is the true and lawful Pastor of the said Bethesda Baptist Church of Port Chester, N. Y.; and it is further

ORDERED, ADJUDGED AND DECREED, that the plaintiffs herein together with the Bethesda Baptist Church of Port Chester, N. Y., the additional defendant herein, and all deacons, trustees or other officers thereof, be and they are hereby enjoined from: (a) in anywise interfering with the said Rev. James H. Howell in his position as Pastor of said Church and in the performance of his duties as such Pastor; and (b) in anywise interfering with the right of the said Rev. James H. Howell to receive from the said Bethesda Baptist Church the compensation or compensations due and to grow due him as such Pastor of the said Church.

Enter:

s/ JOHN J. DILLON,
Justice of the Supreme Court

s/ EDWARD N. VETRANO
Clerk

Opinion of Hon. John J. Dillon.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

CLARENCE RILEY, NELLIE GAUGHRAN, JAMES STITH, ANNIE SMITH, ALLEAN GARDINER, WILLIAM DAVIS, WILLIAM BANKS, CHARLES TURNER, ELLA GREGORY, ETHEL BANKS, ULA KEELER and VERNIE TURNER,

Plaintiffs,

against

REVEREND JAMES H. HOWELL, JOHN OVERBEY, HORACE JONES, MANUEL MANNING, TOM BENNETT, MELVIN MARTIN and MYRON PRICE,

Defendants,

and

BETHESDA BAPTIST CHURCH OF PORT CHESTER, N. Y.,

Defendant.

Index No. 10200-1972

DILLON, J.:

Clarence Riley and the various other named plaintiffs commenced this action for a permanent injunction restraining the defendants Reverend James H. Howell and others from interfering with a meeting of the membership of the Bethesda Baptist Church in Port Chester Scheduled to be held in August, 1972. The answer, in addition to certain denials and defenses, did the following: (1) Joined the church itself as an additional defendant, and (2) set up a counterclaim in behalf of the defendant Howell demanding a declaratory judgment affirming his status as pastor of the Church. The reply to the counterclaim consists of denials and five affirmative

defenses (largely evidentiary in character) and joins in the demand for declaratory relief.

On October 20, 1972, an order was made by Justice Dempsey, which (1) permitted a discontinuance of the complaint, the subject-matter of which had become moot, and (2) directed that the *status quo* be maintained pending the trial of the action. The practical effect of this order was that the Reverend Howell (but apparently not his co-defendants) became in effect the plaintiff in the action because of his counterclaim, and the original plaintiffs together with the church became the defendants through their reply. It is not clear to the Court whether it was the intention of this order to dismiss the complaint against the remainder of the defendants, although that seems to be its effect.

In spite of the huge file amassed in the case, the questions to be determined are relatively narrow in scope. They are: (1) Whether the Reverend Howell was validly employed in the first place as pastor of the church, and (2) whether, assuming such valid employment he was effectively discharged by the acts of the Board of Deacons and of the spiritual body of the church in or about August, 1972.

Prior to his call to the pastorate of Bethesda, the defendant Howell was serving in a similar capacity at the Mt. Bethel Baptist Church in Ridgewood, New Jersey. Under date of March 14, 1970, he was invited by the Chairman of the Board of Deacons of Bethesda to accept a call to the pastorate of that church. There followed a series of meetings with individual members of the Board of Deacons and Board of Trustees, resulting eventually in the delivery to the defendant of a document dated May 1, 1970, constituting the contract between the parties (Deft's. Ex. B). The Pastor was described in this document as the "spiritual overseer of the Church", the "chairman of all business meetings" and a member "ex

officio of all Boards." His salary was fixed at $165. per week, with various fringe benefits.

It is claimed that the contract of employment was void from the beginning, because of supposed fraud on the part of the Reverend Howell, consisting (as it is said) of his concealment of the fact that he proposed to continue as a teacher in the Martin Luther King School in Paterson, New Jersey, on a full-time basis. The defendant testified at the trial that at the time of negotiating the employment agreement he disclosed to the representatives of the Church that he intended to continue his teaching in Paterson. Various members of the Board of Deacons denied that Reverend Howell had made such disclosure, and the claim is now made that the contract was void from the beginning because the defendant's concealment of a fact so material constituted a fraud vitiating the contract. It is sufficient to say that this defense cannot be entertained because it has not been pleaded. The Court has searched carefully through the reply, with its multitude of defenses, and has failed to find any claim of fraud in the inception of the contract. A motion to amend, made in the midst of the trial, so as to plead a defense of fraud, was denied; and properly so, in the Court's opinion, because to allow such a claim to be made in the course of a trial, without prior notice, would amount to nothing less than entrapment of the adverse party. An argument is made now by the plaintiffs that a charge of "unclean hands", made in the fifth affirmative defense of the reply, was sufficient to put the defendant on notice of the plaintiffs' present claim. There is nothing whatever in that defense to substantiate the plaintiffs' argument that the defendant was thereby notified, and should have known he was being charged with fraud by concealment. The Court is not unaware of the present-day policy of liberality in the construction of pleadings. But if the reply in this case may be tortured into a defense of fraud-

ulent inducement, then we may as well do away with pleadings altogether and serve warning on litigants that they must, at their peril, guess at the nature of the adversary's claims.

Furthermore, even if the plaintiffs had pleaded the alleged fraud, the Court would find and does now find in favor of the defendant Howell on the factual issue of whether the church officials knew that he was continuing his work as a teacher in the Martin Luther King school. Of course the plaintiffs have more witnesses on their side of the issue than the defendant, but an issue of fact is not to be decided by counting fingers on the number of witnesses pro and con. It is simply incredible to this Court that the pastor could have continued for almost two years, to travel to a city in New Jersey five days a week and some nine months in the year to teach school, and that none of the church officials knew anything about it until after the commencement of the present trial. It is not strange that Reverend Howell, a person of education and standing in his chosen occupation, and having a wife and two children, should have found it necessary to supplement his salary of about $9,000. a year from the church by serving as a school teacher and thereby earning an additional $8,500. a year. It is a melancholy fact that even God's chosen ministers are not miraculously protected against the demon of inflation. The defendant testified without dispute that the interests of the church were protected by an arrangement he had with the school authorities in Paterson under which he could claim a 15-day leave of absence whenever the interests of the Bethesda Church demanded it. Whether this ever became necessary does not appear. But the claim of the plaintiffs' witnesses that they knew nothing about the defendant's teaching activities for some two years is the best possible proof of the fact that the interests of the church were in no way jeopardized by the arrangement.

The plaintiffs in their brief profess to find an anology, favorable to them, in the unreported opinion of the undersigned, after a trial at Special Term, in *Wasyles v. Stambler*, affd. without op. 28 A. D. 2d 825, app. dismissed 20 N. Y. 2d 893. It is sufficient to say that there is no factual resemblance between the two cases.

In the closing days of the trial a good deal of time was spent in pursuing a point needlessly injected into the case by the defendant Howell, when called as a witness in rebuttal. He testified that in a resume of his experience and qualifications sent to the Pulpit Committee prior to his retainer as pastor, he had disclosed his employment as a teacher in Paterson. When the resume was produced it was found to contain no such disclosure. As heretofore indicated, the Court holds that the non-disclosure of the teaching assignment in that document is immaterial as a defense because of the failure to plead it. The receipt in evidence of the so-called "resume" (Pltf's. Ex. D) was justified for its bearing on the credibility of Reverend Howell as a witness; but the Court declines on that account to reject the defendant's testimony as a whole, preferring to conclude that the defendant really believed, though mistakenly, that the reference to his teaching in Paterson had in fact been included in the resume. On all the evidence the Court concludes that the defendant was validly and effectively retained as pastor of the Bethesda Church by the Board of Deacons with the approval of the church members.

The remaining question is whether he was validly discharged. The evidence in the case is vague as to the motives of those of the Board of Deacons who initiated the move to effect his ouster, and there is a sharp dispute as to whether the proponents of the movement followed approved procedure. Notice should be taken in the first place of the fact that Baptist Churches are unique in that every such church is completely self-

sufficient. There is no organizational connection between any two Baptist Churches (*Walker Memorial Baptist Church v. Saunders*, 285 N. Y. 462). There is no hierarchy, vested with power to prescribe rules for the conduct of such churches in general, including the power to appoint or discharge a pastor (*Hayes v. Board of Trustees of Holy Trinity Baptist Church*, 225 N. Y. S. 2d 316). In the latter case it was pointed out that the trustees of a Baptist Church are expressly forbidden to remove a pastor by section 139 of the Religious Corporations Law, and that consequently the method of effecting such a discharge can only be determined from custom and usage. As evidence of the customs and usages employed in Baptist Churches to discharge a minister both sides called expert witnesses.

The fact must be kept in mind that no specific charges of wrongdoing or misconduct were ever made against the Reverend Howell. The effort to effect his discharge seems to have been founded in nothing more tangible than a general dislike on the part of a bare majority of the Board of Deacons. His teaching activities in Paterson were not the subject of any accusation. He was charged with no misconduct or moral turpitude. Whether under these circumstances a pastor may be discharged was a matter of dispute among the expert witnesses. The Rev. Walter L. Harding, pastor of St. Luke's Baptist Church in New York City for 35 years, was called as a witness by the defendant; he testified that as a matter of Baptist custom and usage a pastor may not be dismissed without charges of specific misconduct. Rev. Conie L. Stamps, a Baptist minister for 46 years and now pastor of the Metropolitan Baptist Church in New York City, testified that charges must be made in writing to the Board of Deacons; and that the Board, if it considered such action warranted, must then call two meetings of the spiritual body of the Church—the first to determine whether the charges are valid, and the second

to take final action for or against the pastor. It seems plain from this testimony that there can be no dismissal of a pastor without formal charges of wrongdoing. On the other hand, the Reverend Randolph Thompson, an expert called by the plaintiffs, whose qualifications were certainly satisfactory, testified that a pastor may be divested of his office without any specific accusation unless a moral charge is made against him, in which case he must be confronted with formal charges.

The Court finds that the weight of the evidence on this issue definitely favors the Reverend Howell. If the procedure advocated by Reverend Thompson were to be followed, a pastor faced with a moral charge would have greater protection than one faced with no charge at all; for the latter would be left in ignorance of the nature of the opposition. It is difficult to accept this premise. The Court is therefore of the opinion that the proceeding against Reverend Howell was defective in its inception.

Even if the dismissal proceeding had been initially valid, the proof that the Reverend Howell's opponents succeeded in ousting him is completely unsatisfactory. There are numerous criticisms of the procedure followed, but the Court will proceed to a discussion of the vote.

During the incumbency of Reverend Howell the Bethesda Church for the first time adopted a constitution. The Court cannot agree with the plaintiffs who argue that the constitution was not validly enacted. The document was prepared by a committee, the congregation was given ample notice, and the document was adopted unanimously at a meeting of the spiritual body of the Church on January 15, 1971. A copy was also filed in the County Clerk's Office, perhaps a needless precaution, but in any event the filing took place on August 8, 1972, and the document was fully in effect prior to the time of the defendant's alleged dismissal. Certain provisions of the constitution are important here. These are to be found

in the section denominated "Church Rules", under the sub-heading of "Pastor". Sub-paragraph "A" of that section provides in part as follows:

> "A simple majority of members present voting shall be necessary to call a Pastor. However, three-fourths (3/4) of the Congregation shall be present to dismiss a Pastor."

The meeting of the congregation called to vote on the demand for the Pastor's dismissal was held on August 20, 1972. It was, of course, important that, in view of the constitutional requirement that three-fourths of the Congregation be present, an accurate and official count be made of those attending the meeting, and that an exact determination be made of those present who were entitled to vote. The proof in this respect is mystifying.

In order to determine the number constituting three-fourths of the Congregation it is necessary first to know the number comprising the whole Congregation. The best evidence of the membership is to be found in Plaintiffs' Exhibit 3, which lists the entire membership for the year 1972 by name and address. The total number of members shown in the exhibit is 195, and in the absence of any contrary explanation the membership of the church on August 28, 1972 will be assumed to be 194 because the name of one member is marked "deceased". The fact that others are marked on the list as "not active" does not mean to the Court, because there is no explanatory testimony, that they had ceased to be members. Three-quarters of 194 is 146 which must be regarded as the minimum number required to constitute a quorum for the purpose of deposing a minister. It might be supposed that there would be evidence making it easy to determine whether the required quorum was present, and whether a majority of that quorum voted for or against the Rev. Howell; but in fact the figures are hopelessly confused.

The minutes of the meeting of August 28, 1972 were taken stenographically and the transcript is in evidence as Defendant's Exhibit M. It is painfully apparent that the meeting was disorderly, with most of the time spent in wrangling over the selection of a chairman. Finally a vote was taken and the plaintiff Keeler, who by that time appears to have taken over the meeting, announced that 34 votes had been cast in favor of Reverend Howell and 65 votes against. That would make a total of 99 people present and voting. But there seemed to be no agreement on what the vote really was and the arguments continued until, and even after, the meeting was adjourned.

In contrast to this testimony the defendant Manuel Manning, a member of the Board of Deacons, testified that he personally counted 141 persons present at the meeting, and that the vote announced by the chairman was 65 against Reverend Howell and 31 to retain him; which would mean that only 96 votes were cast out of a total attendance of 141. Manning's version became more remarkable when he testified that he himself counted 81 votes in favor of Reverend Howell and 40 against—making a total of 121 votes cast, with the Reverend Howell piling up a two-thirds plurality. Manning testified further that he counted the votes three or four times, and always reached the same result.

Still more baffling is the testimony of the plaintiff Clarence Riley. This witness apparently declared himself temporary chairman of the meeting of August 28, 1972, which led to the lengthy dispute reflected in Defendants' Exhibit M. Mr. Riley was then and still is the Chairman of the Board of Trustees; and it is of some importance to notice the express limitation contained in section 139 of the Religious Corporations Law, which says that "the trustees of an incorporated Baptist church shall have no power to settle or remove a minister." In any event, Mr. Riley testified, in contradiction

of Mr. Manning, that there were less than 141 members present at the meeting, but did not at first give a figure. It was later made to appear that on an examination before trial he had said that the number present was 150; but on cross-examination he repudiated this testimony and said the correct number was 114.

It was stipulated by counsel that eight other named individuals, if called as witnesses by the plaintiffs, would testify in the same manner, on direct and cross-examination, as Mr. Riley. These eight witnesses included five of the plaintiffs. Thus we have nine witnesses for the plaintiffs agreeing on the fact that the total number of members present was 114, a number substantially less than that required for a quorum.

There are other inconsistencies on the same subject. Deacon James Keeler testified that at the meeting of August 28, 1972 he was one of two persons appointed to act as tellers; that he looked around and made "a rough count" of 122 people, "including young people." He said that the vote was 78 to 36 against Reverend Howell. Juanita Bethes, the other teller, testified that she determined there was a quorum present by reference to the membership list, but gave no figures. As a matter of fact, a mere count of those present at the meeting would indicate nothing about the presence of a quorum. Mr. Riley conceded that there were at least 6 or 8 non-members present at the meeting. And there is some evidence (such as Mr. Keeler's count of 122 "including young people") that lends substance to a suspicion that mere infants may have been counted and had assistance in voting.

Who had the burden of proving that the Reverend Howell was or was not deprived of his pastorate? In the Court's view that burden rested on the plaintiffs. The constitution of the church provides that "The Pastor shall be elected indefinitely" (Church Rules, "Pastor", sec. 1). The plaintiffs assert that Mr. Howell's pastorate

was effectively terminated by the procedures they initiated in 1972. Those who assert the termination of the appointment, in derogation of the constitution, have the burden of proving the fact since the burden of establishing a fact is on him who asserts it (*St. Andrassy v. Mooney*, 262 N. Y. 368). In any event, and regardless of who carries the onus of the proof, the great weight of the evidence favors the defendant in establishing the lack of a constitutional quorum at the meeting at which the contested vote was taken. The Court finds, on the evidence, that a quorum was not present, and that the resolution was therefore a nullity.

A judgment may be submitted on notice, declaring that the Reverend James H. Howell was lawfully employed in 1970 by the Bethesda Baptist Church; that the Constitution dated December 15, 1970, was validly adopted as the Constitution of said Church; and that the attempt to discharge the Reverend James H. Howell in 1972 was a nullity. No costs are allowed to either side.

Dated: White Plains, New York
April 12, 1973.

s JOHN J. DILLON
J. S. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-308

CLARENCE RILEY, NELLIE GAUGHRAN, JAMES STITH, ANNIE SMITH, ALLEAN GARDNER, WILLIAM DAVIS, WILLIAM BANKS, CHARLES TURNER, ELLA GERGORY, ETHEL BANKS, ULA KEELER and VERNIE TURNER,

Petitioners,

against

REVEREND JAMES H. HOWELL, JOHN OVERBEY, HORACE JONES, MANUEL MANNING, TOM BENNETT, MELVIN MARTIN and MYRON PRICE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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